SANTHANALETCHUMY A/P SUBRAMANIAM

v.

ZAINAL BIN SAAD & ANOR.

HIGH COURT MALAYA, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 11-9-93(T)]
11 JULY 1994

TORT: Road accident - Fatal claim - Rear collision - Deceased cycling in unsteady manner - Whether deceased suddenly wobbled and fell to the right across motor lorry's path - Duty of driver of motor lorry that followed deceased - Apportionment of liability - Trial Court apportioned liability at 20% against deceased-cyclist and 80% against defendant/driver of motor lorry - Whether appellate Court can interfere with finding of trial Court.

DAMAGES: Interest on special damages - 4% per annum from date of accident to date of judgment - Post judgment interest at rate of 8% per annum from date of judgment until realization - Whether Court should itemise interest for special and general damages - Bereavement - Whether part and parcel of general damages - Question of interest - Section 11 Civil Law Act 1956.

This was an appeal by the plaintiff against the decision of the learned Magistrate, against the apportionment of liability at 20% against the deceased-cyclist and 80% against the defendants.

Held:

[1] The learned Magistrate, who had the golden opportunity of seeing the witnesses that gave evidence before him, believed the testimony of the first respondent and the Courrt sitting in the appellate capacity, upon scrutiny of the evidence, cannot but agree with him.

[2] As there was no reason to disagree nor depart from the finding of the learned Magistrate, the appeal must necessarily be dismissed with costs.

[3] As the learned Magistrate in ordering interest had failed to itemise whether that interest was meant for the special damages or general damages, it cannot be said that he had exercised his discretion judicially.

[4] In regard to bereavement, since it is not part and parcel of general damages, there is no interest imposed on it.

[Appeal against liability dismissed with costs. Award of interest on special damages varied. No interest for bereavement].

Cases referred to:

Rosman @ Osman Bin Haji Abdul Rashid v. Rosmah Begum Bt Bahadur Beg [1994] 2 CLJ 101; [1993] 1 AMR 22:919; [1993] MMD September, para 868 ***(refd)***
Clarke v. Edinburgh & District Tramways Co. Ltd. [1919] SC (HL) 35 ***(refd)***
Yahaya bin Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 PC ***(refd)***
Brown & Lynn v. Western S.M.T. Co. [1945] Sessions Cases 35 ***(refd)***
Jones v. Livox Quarries Ltd. [1952] 2 QB 608 ***(refd)***
M. & S. M. Railway Co. Ltd. v. Jayamal [1924] 48 Mad 417 ***(refd)***
Multar v. Lim Kim Chet & Anor. [1982] CLJ 107 / [1982] 1 MLJ 184 ***(refd)***
Lim Eng Kay v. Jaafar [1982] CLJ 27 / [1982] 2 MLJ 156 ***(refd)***
Jefford v. Gee [1970] 1 All ER 120 ***(refd)***
Cookson v. Knowles [1977] 2 All ER 820 ***(refd)***
Pickett v. British Rail Engineering Ltd. [1979] 1 All ER 774 ***(refd)***
Murtadza bin Mohamed Hassan v. Chong Swee Plan [1980] 1 MLJ 216 ***(refd)***
Maimunah bte Hassan (Sebagai Wakil Harta Pusaka Rozita Bte Khamis) & Satu Lagi lwn. Marimuthu s/o Samanathan & Satu Lagi [1993] 1 CLJ 119 ***(refd)***
Murugan v. Lew Chu Cheong [1980] 2 MLJ 139 ***(refd)***
Noor Famiza bte Zabri & Anor. v. Awang bin Muda & Anor. [1994] 2 CLJ 418 / [1994] 1 MLJ 599 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 12(1)
Rules of the High Court 1980, O. 42 r. 12
Law Reform (Contributory Negligence) Act 1945, s. 1(1) (UK)

Other sources referred to:
Charlesworth on Negligence, R.A. Percy, MA, 4th Edn., p. 1127

For the appellant - T. Selvadoray; M/s. Selva & Co.
For the respondents - Loh; M/s. Chong & Poh

JUDGMENT

Haji Abdul Malik Bin Haji Ishak JC:
Santhanee a/p Supramaniam, aged 12 years 10 months, was tragically killed in a road accident at approximately 25 km Jalan Taiping/Bruas, Trong, Perak Darul Ridzuan. She was cycling at the material time, when she was run down by a motor-lorry AAW 7500, driven by the first respondent, from the rear and that motorlorry was owned by the second respondent. The learned Magistrate, Magistrate's Court, Taiping, Perak apportioned liability at 20% for the cyclist and 80% for the respondents and, being dissatisfied, she appealed against that decision. Before the lower Court, the parties agreed as to the quantum of damages and this must have greatly facilitated the work of the trial Magistrate.

Evidence was led before the lower Court that the deceased was riding her bicycle behind the other band of bicycles in a line on the left side of the road in the direction of Bruas. Poogantahi a/l Kupusamy (PW3) was ahead on his bicycle followed closely from behind, about four feet apart, by Kanagambukan a/p Gurusamy (PW2), and the deceased then followed suit, from behind at the same distance. The trio were said to cycle some one feet away from the left edge of the tarred road in a bee-line position that morning. Poongantahi turned his head 10 minutes before the accident and noticed that the other two cyclists behind him were moving well in unison. Kanagambujam, on the other hand, gave evidence that she turned her head 5 minutes before the accident and saw the deceased cycling well within the distance as adverted to earlier. From the tenor of both these witnesses, one thing is certain and that is this: both of them did not look back at the material time when the accident took place and, consequently, they did not witness the accident.

The first defendant, an experienced driver of 18 years standing, gave evidence and he stated that the weather was normal though misty that fateful morning and his vision was slightly blurred. The time was 7.00 am and on both sides of the road, oil palm trees stood luxuriantly. That stretch of the road was winding as can be seen from the coloured photographs supplied by the lower Court. The tarred road was said to be narrow and there was a center white doted line. But, from the sketch plan the following salient points emerged: from the left side of the tarred road, particularly from B to C,, it measured 2 m. 60 cm. and on the gravel portion the measurement was 5 m 00 cm. from A to B. Thus, there was ample space on the left side of the road if one were to take into account both the tarred and the gravel portions. Similarly, on the right side of the tarred road, from C to D, the measurement was 2 m. 65 cm., with the gravel portion measuring 4 m 75 cm. and, by simple arithmetic, the right side of the road too was quite wide. Be that as it may, the first respondent alleged that at a distance of 100 meters away he saw the deceased cycling on the left side of the tarred road behind two other cyclists and as he approached the deceased from the rear, he saw to his amazement that the deceased cycled unsteadily (terhoyong hayang) and fell to the right side of the tarred road. The first respondent honked, applied his brakes and swerved to the right causing the motorlorry to travel across the centre dotted white line in an obvious attempt to avoid and evade possible collision with the deceased cyclist. This proved futile. The motorlorry hit the deceased who by then had fallen onto the tarred road. That motorlorry ran over the head of the deceased.

From the two versions by both parties, the learned Magistrate chose to believe the first respondents as opposed to that of the appellant. I have said in *Rosman @ Osman bin Haji Abdul*

Rashid v. Rosmah Begum bte. Bahadur Beg ([1994] 2 CLJ 101; [1993] 1 AMR 22:919 and [1993] MMD September issue paragraph 868) that:

> ...where there were directly contradictory versions the acceptance or rejection of which significantly depended on the oral testimony of the protagonists, the role of the appellate Court is clear, that is, the appellate Court has to accord to the findings of fact of the trial Court the greatest respect and ought not to disturb them unless it is satisfied that the trial Court had reached a wrong decision.

On the question as to whether the appeal Court can interfere with the finding of the trial Magistrate, Lord Shaw in *Clarke v. Edinburgh & District Tramways Co. Ltd.* [1919] SC(HL) 35 at page 37 had this to say:

> In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case the question, am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the Judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In *Yahya bin Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117 PC, it was held *inter alia* that (see the headnotes):

> ...this was not one of those rare cases where an appellate Court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial Judge on the question of credibility. There was no reason to think that the trial Judge had not taken proper advantage of his having seen and heard the witnesses.

Now, users of the road like the first respondent must have been, by now, accustomed to the manoeuvres of bicyclists. It is not uncommon for bicyclists to know that traffic is coming up behind them, and they or some of them would simply ride in what ever fashion they deem fit and leave everything to the traffic behind them to avoid an accident. This was the attitude of the deceased. She cycled in an unsteady gait, uncontrollably and unable to control her bicycle and simply left it to the first respondent to do the needful. If that was the only thing she did, the first respondent by his evasive actions could have avoided the accident. Unfortunately, the deceased's inability to control her bicycle resulted in the bicycle, toppling to its right directly in the path of the moving motor lorry. The respondent must have, on the spur of the moment, reacted spontaneously to swerve to the right, to brake and to honk, an exhibition of his years at the wheel, but all these came to naught.

The question whether the deceased suddenly wobbled and fell to the right across the motorlorry's path, in my view, is crucial to the question of liability for the accident. If as alleged by Poongantahai and Kanagambujam that the deceased rode in unision and in a steady fashion one feet from the left edge of the tarred road, that conduct by itself would amount to contributory negligence on the deceased's part for she could have used the gravel road on her left which measured 5m. 00 c.m. in width, sufficient berth for the deceased to use and to avoid the on coming motorlorry driven by the first respondent from behind her. It must be borne in mind that the learned Magistrate in accepting the version of the first respondent must have found that the first respondent honked his motorlorry - that sound should have alerted the deceased to swerve onto the gravel portion of the road and, in consequence, the accident would be avoided. For that failure, the learned Magistrate rightly imposed 20% liability on her.

This brings me to the next pertinent question: What was the duty of the first respondent as the driver of the motorlorry that followed the deceased as she was cycling that fateful morning? The answer must surely depend on the facts of the case. Lord Justice Clerk (Cooper) had occasion to say in *Brown & Lynn v. Western S.M.T. Co.* [1945] Sessions Cases 35 that:

> We were urged in the course of debate to substitute our own definition of the limits of a following driver's duty, and even to prescribe the proper interval at which successive vehicles should keep station when travelling in a city street. I am not prepared to do so. The distance which should separate two vehicles travelling one behind the other must depend upon many variable factors - their speed, the nature of the locality, the other traffic present or to be expected, the opportunity available to the following driver of commanding a view ahead of the leading vehicle, the distance within which the

> following vehicle can be pulled up, and many other things. The following driver is, in my view, bound, so far as reasonably possible, to take up such a position, and to drive in such a fashion, as will enable him to deal successfully with all traffice exigencies reasonably to be anticipated: but whether he has fulfilled this duty must in every case be a question of fact, just as it is a question of fact whether, on any emergency disclosing itself, the following dirver acted with the altertness, skill and judgment reasonably to be expected in the circumstances.

That stretch of the road where the accident took place was winding, quiet and practically deserted. There were no on coming vehicles at the material time. It was more of a kampong road with the deceased following her two other friends on her bicycle. The deceased was not an employee of the estate as she did not carry anything on her bicycle and this fact came directly from her mother Santhanaletchumy (PW1) and from the evidence of both Poonganthai and Kanagambujam. In short, unlike her two other friends, the deceased did not carry any container filled with rubber latex at the rear portion of her bicycle (see the coloured photographs made available to the Court). Thus, her bicycle must have been light in comparison with the bicycles ridden by her two colleagues. Being light, the deceased should have been able to manoeuvre her bicycle easily on that road. As the evidence unfolded, she was incapable of handling her bicycle as well as can be expected. Why was this so? Was it due to her young age? Both parties agreed before the trial Court that, at the material time, the deceased was 12 years 10 months old. At that age, could the deceased be guilty of contributory negligence? **Charlesworth on Negligence**, 4th edition by R.A. Percy, M.A. at p. 1127 said this:

> When a child is negligent, in the sense that he could by the exercise of reasonable care have prevented or avoided the damage in question, he cannot recover; but in considering what is "reasonable care" the age of the child must be considered. Infancy as such is not a "status conferring right," so that the test of what is contributory negligence is the same in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportioned to the age of the child. (This portion was extracted and considered in *Mohamad Safuan & Anor. v. Mohd Ridhuan bin Ahmad* [1994] 2 MLJ 187).

The author continued by saying that:

> There is no age below which, as a matter of law, it can be said that a child is incapable of contributory negligence. Expressions are to be found referring to children "too young to be capable of contributory negligence" or "of such a tender age as to be regarded in law as incapable of contributory negligence," but these must be taken to be referring to children found on the facts of a particular case to be so young that contributory negligence cannot be attributed to them.

Applying the above principles and on perusal of the evidence of the deceased mother, the deceased was earning a living "cuci mangkuk getah di ladang" and was paid RM100 per month. These facts would show that the deceased, a matured individual, could by an exercise of reasonable care have prevented or avoided the accident by, firstly, travelling on the gravel portion and, secondly, moving to the gravel portion upon hearing the sound of honking or the engine of the motorlorry from the rear. Consequently, the deceased was guilty of contributory negligence.

In this country the law on contributory negligence is found in s. 12(1) of the Civil Law Act 1956 which reads as follows:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Incidentally, s. 1(1) of the United Kingdom's Law Reform (Contributory Negligence) Act 1945 is identical to our s. 12(1) of the Civil Law Act 1956.

Denning LJ defined contributory negligence in a novel way in the case of *Jones v. Livox Quarries Ltd*. [1952] 2 QB 608, 615 in the following words:

> Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the possibility of harm to others, so contributory negligence

a requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

In another part of his judgment, Denning LJ said:

Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the b consequences. The consequences do not depend on foreseeability, but on causation. The question in every case is: What faults were there which caused the damage? Was his fault one of them?

The deceased must have foreseen that if she cycled one feet from the left edge of the tarred road in a wobbly manner and then, out of sheer inability to control her bicycle, fell onto the right side of the tarred road, such actions would cause harm to herself. That was the extent of her contributory negligence.

c At her age, the deceased cannot be careless and unmindful of the safety of others while she was cycling on the road. She knew and was capable of knowing the danger posed to her while cycling in that fashion (see *M. & S.M. Railway Co. Ltd. v. Jayamal* [1924] 48 Mad 417).

Somehow, both Poonganthai and Kanagambujam in their evidence alleged that the first respondent after colliding with the deceased cyclist, hit the bicycle ridden by Kanagambujam which caused the bicycle to lurch forward and that bicycle then hit the bicycle ridden by d Poonganthai, thereby causing both of them to be thrown off their bicycles. This must have been an afterthought because the coloured photographs do not show a single damage to the two bicycles ridden by Poonganthai and Kanagambujam. Next, both of them alleged that after the accident, the first respondent reversed the motorlorry and the front left tyre of the motorlorry went over the head of the deceased. But unfortunately, a serious allegation of this nature was not supported by the police report lodged by Kanagambujam on 11 December 1990 at 6.10 p.m. (P3) nor by the police report lodged by Poonganthai on 11 December 1990 at 6.30 p.m. (P4). These e police reports (P3 and P4) were also at variance with the sketch plan and the key to it and it was no wonder that the learned Magistrate rejected the version of the appellant (*Multar v. Lim Kim Chet & Anor*. [1982] 1 MLJ 184, 185). On the other end of the scale, the first respondent's version that the deceased rode the bicycle unsteadily was supported by his police report lodged on the very day of the accident (4 December 1990) at about 8.15 a.m., some one hour and fifteen minutes after the accident. The first respondent even denied in his evidence that he had reversed his f motorlorry after the accident and stated that immediately upon impact, he switched off the engine, alighted and hailed a passing vehicle for fear of being assaulted and proceeded straight to Trong police station to lodge a report. When confronted with the photographs showing the position of the motorlorry and the broken front windscreen of the motorlorry, the first respondent stated that he did not move his motorlorry to the various positions as shown in the photographs and when he left the motorlorry on the centre of the broken white line, the windscreen was still intact. The learned Magistrate who had the golden opportunity of seeing g the witnesses that gave evidence before him believed the testimony of the first respondent on these points and, I, sitting in the appellate capacity, upon scrutiny of the evidence, cannot but agree with him. In relation to the bicycle, the size of the motorlorry was formidable. An accident of that nature cannot cause the front windscreen of the motorlorry to be smashed into pieces. This point was amply considered by the learned Magistrate and I saw no reason to disagree nor depart from it.

h On the question of interest, the learned Magistrate gave 8% per annum from the date of judgment till the date of realisation, and the learned Counsel for the appellant argued that, in so doing, the learned Magistrate had manifestly erred. His Lordship Salleh Abbas FJ (as he then was) in *Lim Eng Kay v. Jaafar* [1982] 2 MLJ 156 applied *Jefford v. Gee* [1970] 1 All ER 120, 1205 and considered *Cookson v. Knowles* [1977] 2 All ER 820, 823 in the light of *Pickett v. British Rail Engineering Ltd.* [1979] 1 All ER 774 together with *Murtadza bin Mohamed Hassan v. Chong Swee Plan* [1980] 1 MLJ 216, 218 and after holding that O. 42 r. 12 of the Rules of the High Court i 1980 cannot override the provision of the Civil Law Act 1956 especially s. 11 thereof, upheld the award of interest at 6% from the date of service of the writ (21 November 1975) to the date of

realisation on the lump sum awarded for pain and suffering and loss of amenities, and at 3% from the date of accident (13 October 1973) till the date of payment on the aggregate of the amount agreed as special damages and the sum awarded as pre-trial loss of income by the learned trial Judge. His Lordship was of the view that:

> the ordering of interest to be included in a sum awarded for damages is a judicial discretion;

and further

> ... interest is not to be confused with inflation. Interest is not awarded as a compensation on account of inflation, but awarded because an injured plaintiff has been deprived of the use of money to which he is entitled.

His Lordship further said that:

> There is no ground for us to depart from the practice adopted by the Courts in this country, and the size of the award in this case is certainly not a sufficient ground for us to do so.

That practice stood still today and Judges have been awarding interest at their discretion according to the facts of each case. Thus, in *Maimunah bte Hassan (Sebagai Wakil Harta Pusaka Rozita Bte Khamis) & Satu Lagi lwn. Marimuthu s/o Samanathan & Satu Lagi* [1993] 1 CLJ 119, his Lordship Haji Mohd. Noor bin Hj. Ahmad set the interest at:

> Faedah diberi sebanyak 8% setahun atas gantirugi am masing-masing dari tarikh penyerahan writ (14 Januari 1988) dan sebanyak 4% setahun atas gantirugi khas sebanyak RM3,300 dari tarikh kemalangan (31 Mei 1985), kedua-duanya hingga ke tarikh penghakiman diberi.

In *Murtadza bin Mohamed Hassan v. Chong Swee Plan (supra),* his Lordship Chang Min Tat FJ (as he then was) gave "interest at 3% on special damages from date of accident to date of trial and at 6% on the general damages for pain and suffering and loss of amenities from date of service of the writ". In *Murgan v. Lew Chu Cheong* [1980] 2 MLJ 139, his Lordship Chang Min Tat FJ sitting in the High Court dismissed the claim with costs but gave interest for loss of part earnings at "3% per annum from the date of the accident to the date of the judgment." In *Multar v. Lim Kim Chee & Anor.* [1982] 1 MLJ 184, his Lordship Syed Othman FJ gave RM22,000 for pain and suffering, loss of amenities and earning capacity and levied interest on it at 6% from service of writ. His Lordship also gave 3% interest from date of accident for special damages. Finally, in *Noor Famiza bte Zabri & Anor. v. Awang bin Muda & Anor.* [1994] 1 MLJ 599, I stated:

> Now, applying the conventional rate of interest permitted by our Courts, i.e. 8% p.a., therefore, the correct rate payable on special damages in the present case, must be 4% p.a. from the date of accident until the date of judgment and only thereafter would the plaintiffs be entitled to 8% p.a. until realization.

In another part of the same judgment, I stated further:

> Finally, I award interest for general damages at the rate of 6% p.a. from date of filing of the suit to date of judgment.

These are random samples of the cases to show a trend in awarding interest in running down cases. These cases show the exercise of judicial discretion by the relevant Judges as explained by his Lordship Salleh Abbas FJ (as he then was) in *Lim Eng Kay v. Jaafar (supra).*

It is obvious that the learned Magistrate in ordering interest failed to itemise whether that interest was meant for the special damages or for the general damages and, therefore, it cannot be said that he had exercised his discretion judicially. In reversing this part of the learned Magistrate's order, I awarded on special damages interest at 4% per annum from the date of accident until the date of judgment and, thereafter, the appellant be entitled to 8% per annum until realization. On general damages, an award was made for interest to be at the rate of 6% per annum from the date of filing of the suit to the date of judgment. In regard to bereavement, since it is not part and parcel of general damages, I declined to impose any interest on it.

For the above reasons, the appeal was dismissed with costs.